

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of HAYES/HAYES-HENRY/HAYES-  
JOHNSON/HAYES-BYRDSOY, Minors.

UNPUBLISHED  
March 20, 2014  
  
No. 317380  
Wayne Circuit Court  
  
Family Division  
LC No. 11-501615-NA

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In the Matter of HAYES/HAYES-HENRY/HAYES-  
JOHNSON/HAYES-BYRDSOY, Minors.

No. 317383  
Wayne Circuit Court  
  
Family Division  
LC No. 11-501615-NA

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Before: BECKERING P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from orders terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), and (g). We affirm.

**I. FACTUAL BACKGROUND**

In June 2011, the court authorized the initial petition in this matter based on respondent mother's drug use and respondent father's failure to visit or support his children. Respondents made admissions and the court assumed jurisdiction over their children. The court ordered respondents to comply with a treatment plan requiring parenting classes, substance abuse services, counseling, suitable housing, income and visitation. In October 2012, respondent mother gave birth to her sixth child and the court assumed jurisdiction over that child as well. In April 2013, the court authorized a termination petition concerning all six children based on respondents' lack of compliance with their treatment plan. The court terminated both respondents' parental rights after a hearing. This appeal followed.

## II. STATUTORY GROUNDS

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The trial court's decision is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

MCL 712A.19b(3)(c)(i), (c)(ii), and (g) permit termination of parental rights under the following circumstances:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

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(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Respondent mother argues that termination was not warranted under any of these provisions. She argues the evidence established that she no longer used drugs. She points out that the evidence established that she completed some services and that she had suitable housing and support from friends. In support of her argument, respondent mother relies on *In re Carter Minors*, unpublished opinion per curiam of the Court of Appeals issued March 6, 2012 (Docket No. 304476). *Carter* is unpublished and is therefore not binding authority. *McGuffin v Overton*, 214 Mich App 95, 104; 542 NW2d 288 (1995). Moreover, although respondent denied any recent drug use and submitted negative screens, there was no other evidence indicating

respondent mother was making progress on her drug addiction, as was the situation in *Carter*. To the contrary, the evidence established that respondent mother had not completed any substance abuse treatment but had been terminated from treatment programs for lack of compliance. Further, she completed just 20 out of 60 screens, despite being warned that any missed screen was considered positive.

Respondent mother's long-term substance abuse, failure to complete any substance abuse treatment, and her minimal compliance with the screening requirement justified a conclusion that she had not fully resolved her substance abuse issue. Moreover, she still had not completed her treatment plan despite the length of time her children were in care. She also failed to acquire adequate parenting skills, despite the completion of two parenting classes. According to the foster care worker, respondent had not benefited from the two sets of parenting classes she completed. Respondent refused to internalize her children's needs, lacked insight about her children's behavior, and was unable to adequately interact with her children. The worker felt that respondent would not be able to parent her children any time in the near future. Although respondent presented evidence of her parenting skills through the testimony of friends, the court did not find this evidence credible and we defer to the court's credibility determination. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court did not clearly err in finding statutory grounds to terminate respondent mother's parental rights to her six children.

Respondent father argues that termination was improper because the Department of Human Services (DHS) failed to make reasonable reunification efforts to reunite his two children with him. Generally, reasonable reunification efforts must be made to reunite the parent and child unless certain aggravating circumstances exist. *Mason*, 486 Mich at 152; *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012); MCL 712A.19a(2). However, while DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of a respondent to participate in the services that are offered. *Frey*, 297 Mich App at 248.

In this case, respondent father argues that DHS failed in its responsibilities because it did not place the children with him initially after they were removed from respondent mother's care. However, when the court assumed jurisdiction, respondent father was unemployed, had no source of income, and was residing with his grandmother. Before his children were removed from their mother's care, he failed to consistently visit his children or provide any regular support for them. Given these circumstances, respondent's claim in this regard is without merit.

Moreover, DHS set up various court ordered services for respondent father, but he failed to follow through despite repeated referrals. The record shows that DHS made reasonable efforts, but respondent did not take advantage of the services offered.

We conclude that the trial court did not clearly err in finding at least one statutory ground to terminate respondent father's parental rights was proven. He failed to comply with a treatment plan designed to enable him to properly care for his children or even to make any significant progress, despite the lengthy period of time his children were in care. Most egregiously, he did not regularly maintain contact with his children. Termination of his parental rights was warranted.

### III. BEST INTERESTS

Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights if the court also finds that termination of parental rights is in the best interests of the child. MCL 712A.19b(5). Whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In deciding a child's best interests, a court may consider the child's bond to his parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the suitability of alternative homes. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). The trial court's decision is reviewed for clear error. *Trejo*, 462 Mich at 356-357.

In this case, respondent mother testified that she loved her children. She had completed therapy, claimed she had a support system in place, and felt she could properly care for all six children. However, the foster care worker described respondent mother's lack of parenting abilities, expressed concern about her ability to keep her children safe, and felt she would not be able to parent her children any time in the near future. The worker felt that respondent was not receptive to receiving information about the various special needs of her children and felt respondent could not provide the stability and permanency they needed to thrive. As an example, when approached regarding DHH's extreme behavior the mother replied, "That is just DHH being DHH." Respondent mother failed to comply with a treatment plan meant to ensure she could safely parent her children. Given these circumstances, the trial court did not clearly err in concluding that termination of respondent mother's parental rights was in her children's best interests.

Although there was some evidence that respondent father was appropriate with his two children, he continued to have minimal contact with them while this case was pending. The worker felt respondent father's children were not bonded with him, and he had not made any significant progress on a treatment plan designed to ensure he could safely parent his children. Given this evidence, the trial court did not clearly err in finding that termination was in his children's best interests.

### IV. RIGHT TO COUNSEL

In Docket No. 317383, respondent father raises several additional challenges related to his representation. First, he contends that his due process rights were violated because he was denied his right to counsel. His claim is based on the fact that no attorney appeared for him at several hearings and the court removed his attorney at the December 2012 review hearing. This unpreserved claim is reviewed for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). To avoid forfeiture under the plain error rule, respondent must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected his substantial rights. *Id.*

"The essence of due process is fundamental fairness," *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (internal quotations and citation omitted), and it "applies to

any adjudication of important rights.” *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993). The constitutional concept of due process grants respondents the right to counsel in child protective proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000).

In this case, respondent father has not established that his substantial rights were affected when a pretrial was held without his counsel present. Although counsel did not appear at the June 2011 pretrial hearing, the only matters addressed at this hearing were an update on the children’s situation, clarification of the paternity status of the various fathers, and service issues. Subsequently a new pretrial date was set at which counsel was present and no claim of prejudice was raised at that hearing.

While it is of great concern to this Court that there were several review hearings held where respondent father was unrepresented, he has not established that his substantial rights were adversely affected by his attorney’s absence during review hearings in 2012. Respondent does not point to any erroneous information provided to the court that his counsel would have corrected, does not specifically indicate what favorable information his attorney could have provided, and does not make any other valid claim of prejudice. Although he contends that the court’s removal of his attorney at the December 2012 hearing was especially harmful because the worker indicated a termination petition was planned, the court did not order that a termination petition be filed at that hearing and continued with the permanency plan of reunification. Contrary to respondent’s claim, there is no basis other than speculation upon which to conclude that this action affected his rights at subsequent hearings.

Next, respondent raises a claim of ineffective assistance of counsel. Whether respondent was denied the effective assistance of counsel presents a question of constitutional law subject to review de novo. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). This Court’s review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings. *CR*, 250 Mich App at 197-198. To prevail on his claim of ineffective assistance of counsel, respondent father must show that his counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced him and denied him a fair trial. *Id.* at 198. To establish prejudice, respondent must show that there is a reasonable probability that, but for his counsel’s unprofessional errors, the result would have been different. *Id.*

Respondent first asserts that counsel was ineffective at disposition for failing to object to the substance abuse components of his treatment plan. We disagree. Although there were no allegations in the initial petition that respondent father abused substances, the court was informed that respondent mother used drugs throughout her pregnancy with respondent’s son, and that respondent maintained a relationship with her even after his child tested positive for marijuana at birth. Given that respondent father was apparently closely involved with respondent mother during the time she used drugs, it was not unreasonable for the court to also require him to take part in substance abuse services based upon a reasonable inference that he was, at least, aware of and possibly complicit in mother's use. Therefore, counsel was not ineffective for failing to object to that aspect of his treatment plan.

Respondent also claims that he was denied the effective assistance of counsel at review hearings because his attorney failed to offer any positive evidence, such as the lease for his home, verification of his job, or explanations of why he failed to comply with his treatment plan. However, there is no indication that offering additional documentation concerning his job or housing would have made any difference in the outcome of review hearings. The court's focus had been on his failure to visit and bond with his children or to meaningfully participate in any substance abuse program. Moreover, the court received some explanations from both the worker and respondent concerning his lack of compliance with his treatment plan, and the record does not indicate any further explanation actually existed.

Finally, respondent asserts that he was denied the effective assistance of counsel during the termination hearing because his attorney failed to introduce any evidence or challenge the adequacy of reunification efforts. Counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived respondent of a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). Moreover, decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy, which this Court will not second-guess. *Id.* at 589-590.

In this case, while counsel did not present any witnesses or evidence, counsel did conduct vigorous cross-examination of the various witnesses and established testimony favorable to respondent father. However, the record does not show there was any other evidence that would have been helpful to respondent's case. We decline to second-guess counsel's decision not to challenge the adequacy of the reunification efforts DHS made.

Affirmed.

/s/ Jane M. Beckering  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Riordan